

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments of the parties, the Board finds that the Administrative Law Judge's award should be affirmed.

The Award of the Administrative Law Judge sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the Administrative Law Judge as its own as if specifically set forth herein.

The primary issue on review is whether the claimant's refusal to undergo the surgical procedure recommended by both doctors was unreasonable.

K.A.R. 51-9-5 provides:

"An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or termination of compensation beyond the period of time that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal."

Dr. Toby and Dr. Ketchum were deposed in this matter and both recommended bilateral carpal tunnel surgery. Although both doctors agreed that the risks associated with this type of surgery are extremely small, they did acknowledge that any surgical intervention has attendant risks. The doctors noted that the potential risks of the proposed surgical procedures included the chance of infection, nerve damage, tenderness in the palm, lack of grip strength, hematoma leading to scar tissue formation, traction neuritis, or adhesions to the median nerve and the risk of no improvement at all. Both doctors further opined that surgery would most likely provide some relief from pain. However, neither doctor would say surgery would cure the claimant or that all the pain and numbness would be relieved. Ultimately, both doctors concluded that following surgery there would be some residual permanent impairment to the claimant.

The claimant, after being apprised of the procedure and risks involved with surgery, simply determined not to undergo the surgical procedure because she was afraid of needles, afraid of anesthesia and basically afraid of surgery. She further noted that some co-workers who had surgery for the same condition were still having the same symptoms that they had prior to their surgeries.

As the Administrative Law Judge noted in her award, the claimant throughout her life has avoided needles and anesthesia. The claimant's consistent behavior in this regard was demonstrated by her actions early on in the treatment for her current symptomatology when she had refused to have steroid injections that were recommended because of her

fear of needles. The claimant had otherwise followed recommended conservative treatment modalities such as using splints and anti-inflammatory medications. At the time of the regular hearing the claimant had continued to work without any accommodations and noted that she would not undergo surgery if her pain got worse because of her fear that surgery would do more harm.

In *Morgan v. Sholom Drilling Co.*, 199 Kan. 156, 427 P. 2d 448 (1967), the Court stated:

"In *Gutierrez v. Harper Construction Co.*, 194 Kan. 287, 398 P.2d 278, we considered the effect of the workmen's compensation director's rule 51-9-5. This rule states that unreasonable refusal of the workman to submit to surgical treatment, where the danger to life would be small and the probabilities of a permanent cure great, ordinarily justifies refusal of compensation beyond the period of time the injured would have been disabled had he submitted to an operation.

In *Gutierrez* we said before refusal can be unreasonable under the director's rule the probabilities of a permanent cure must be great.

The medical testimony of all three orthopedist in the present case establish that in event the operation was successful the workman would still have residual permanent partial disability of 10 percent. Under the evidence, no permanent cure was possible and the director's rule does not apply." 199 Kan. at 161.

The director's rule referred to in the *Morgan* decision is the same in all material respects as K.A.R. 51-9-5. In *Morgan* the Court specifically noted that there was no evidence that the recommended treatment would be a permanent cure. The same factual situation is present in this case. In the absence of evidence that surgery would provide a permanent cure the regulation does not apply. The claimant's refusal of the proposed surgery was not unreasonable.

The next issue raised on review is the nature and extent of the claimant's disability. The respondent argues that if the refusal by the claimant to undergo the surgical procedures does not result in a complete denial of benefits then the claimant's permanent partial disability should be reduced. This argument is premised upon Dr. Toby's opinion that if the claimant underwent the bilateral carpal tunnel surgery her permanent impairment would be reduced to less than 5 percent to each extremity. The doctor noted that such an expectation was based upon his experience in performing the surgery and the typical result. Nonetheless, such an opinion is speculative and is not the best evidence where the doctors have both rated the claimant's current functional impairment.

Dr. Toby and Dr. Ketchum both provided ratings based on the claimant's condition after their examinations. As the Administrative Law Judge noted both doctors are qualified to provide opinions regarding the claimant's condition and an average of their two ratings was warranted. The Board adopts that rationale and reasoning and determines that the claimant has a 32 percent whole body permanent partial disability as a result of her work-related accident.

In response to a question at oral argument before the Board, the claimant raised the issue of whether Dr. Toby's rating was appropriately converted from an upper extremity rating to a whole body rating.

Review of Dr. Toby's testimony regarding impairment reveals that his rating for impairment of function was limited to 20 percent to each upper extremity with an additional 3 percent to the left for the claimant's trigger thumb condition. It is apparent that the Administrative Law Judge, using the conversion and the combined value charts of the *AMA Guides to the Evaluation of Impairment*, Fourth Edition, extrapolated those upper extremity ratings to a whole body rating.

After the medical expert testimony has provided a percentage of functional disability to the claimant a reference to the conversion and combined value charts in the *Guides* requires neither medical expertise nor subjective discretion and is simply an objective matter of reading a number on a chart. The Board concludes there was no error committed by the administrative law judge in utilizing the *Guides* conversion and combined value charts to arrive at the appropriate whole body rating under such circumstances.

Lastly, the respondent argues that claimant should be denied future medical treatment because of her refusal to undergo the recommended surgery. Absent a finding that the refusal of medical treatment was unreasonable the respondent's argument is rejected. Moreover, in connection with any request for future medical treatment the fact finder must determine that there is a causal connection between the requested treatment and the original injury. In the event claimant seeks future medical treatment the fact finder will at that time be able to address the concern of whether or not such treatment is necessitated by the original injury. The claimant is entitled to future medical treatment upon proper application to the director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that the award entered herein by Administrative Law Judge Julie A.N. Sample on May 26, 2000, should be and hereby is affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

pc: Dennis L. Horner, Kansas City, KS
Michelle Daum Haskins, Kansas City, MO
Julie A.N. Sample, Administrative Law Judge
Philip S. Harness, Director